

ELECTORS FOR PRESIDENT AND VICE PRESIDENT.

MAY 27, 1912.—Ordered to be printed.

Mr. Root, from the Committee on the Judiciary, submitted the following

ADVERSE REPORT.

[To accompany S. J. Res. 98.]

The Committee on the Judiciary, to which was referred Senate joint resolution 98, being a resolution which undertakes to fix the number of presidential electors which the several States shall have in the next and ensuing presidential elections, have considered the same and report adversely thereon for the following reasons:

The effect of adopting such a rule would be to determine the number of electors to which each State is entitled by reference to the census of 1900 and the population which the State had at that time, instead of fixing it by reference to the last census, taken in 1910, and the population which the State now has in accordance with that last census.

In our opinion, no such rule is provided or permitted by the Constitution:

The Constitution declares:

Article II, section 1, paragraph 2:

Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress.

Article I, section 3, paragraph 1:

The Senate of the United States shall be composed of two Senators for each State.

Article I, section 2, paragraph 1:

The House of Representatives shall be composed of Members chosen every second year by the people of the several States.

Article I, section 2, paragraph 3:

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and, excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent

term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to three; Massachusetts, eight; Rhode Island and Providence Plantations, one; Connecticut, five; New York, six; New Jersey, four; Pennsylvania, eight; Delaware, one; Maryland, six; Virginia, ten; North Carolina, five; South Carolina, five; and Georgia, three.

The fourteenth amendment, section 2:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Under these provisions the relative proportion, as between the States, of their Representatives in Congress and in the electoral college is fixed absolutely by the Constitution upon the determination of a fact; that is, upon the determination of the respective numbers of persons in each State, excluding Indians not taxed. The Constitution commands this determining fact to be ascertained by an actual enumeration to be made within each term of 10 years, and further commands that Representatives shall be apportioned among the several States according to the numbers so ascertained. Congress has performed the duties thus imposed upon it by the Constitution. By the census of 1910 the respective numbers of persons in each State have been ascertained, and by the act of August 8, 1911, entitled "An act for the apportionment of Representatives in Congress among the several States under the Thirteenth Census," Representatives have been apportioned among the several States in accordance with the number of persons thus ascertained.

It seems clear that when these duties imposed upon the Congress by the Constitution had been performed, each State became entitled by force of the Constitution to the number of Representatives thus apportioned to it and to the number of presidential electors equal to the number of its Senators and Representatives so apportioned.

It seems equally clear that it is not competent for Congress to take away, modify, or change that constitutional right.

The argument in favor of the resolution now under consideration is that because the old Congress, elected two years ago, under the old apportionment based on the census taken 12 years ago, will still be in office at the time when electors are chosen in November next the numbers of Representatives in that Congress are to be the guide in fixing the number of electors instead of the numbers to which the States are entitled under the new enumeration and apportionment already made under the mandate of the Constitution. This can not be, because the fact that the old Congress will still be in office at the time of the presidential election is a matter not of constitutional requirement but of congressional arrangement, and Congress can not by arranging the terms of Congress take away from the States their rights to proportional representation in accordance with their numbers under the provisions of the Constitution.

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That the holding over of the old Congress at the time of a presidential election is purely a matter of congressional arrangement appears by an examination of the Constitution, which provides, in the second section of the article above cited, that the Representatives shall be "chosen every second year by the people of the several States," but does not provide when they shall be chosen or when their terms shall begin and end. These matters are expressly committed to Congress. The Constitution provides:

Article I, section 4:

The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The Congress shall assemble at least once in every year, and such meetings shall be on the first Monday in December, unless they shall by law appoint a different day.

Article II, section 1, paragraph 3:

The Congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States.

It thus appears that while the Constitution fixes expressly the rights of the States to their proportional numbers of Representatives and electors, according to their population as ascertained by the decennial census, it leaves the Congress to determine when the Representatives shall be elected and when they shall meet and when the electors shall be chosen and when they shall meet. Congress can, in the exercise of its discretion for the arrangement of these various dates, provide that the Representatives under the new apportionment shall be elected and shall meet before the electors are chosen or after the electors are chosen, but it can not be considered that the arrangements which Congress sees fit to make for the convenience of the country and the dispatch of public business in regard to the times when these elections and meetings shall take place control the rights of the States to that proportional representation which the Constitution itself has given to them.

The controlling consideration in construing the provisions of the Constitution which relate to this subject must be the perfectly plain intent of the Constitution to give to each State a share in the selection of the President proportionate to its share of the population of the country. This is the natural and just rule and there is no room whatever for doubt that this is what the Constitution intended. No construction which frustrates this intention should be permitted. The intention can receive effect only by giving to each State the number of Representatives and electors which are proportionate to its population at the time when the choice of the people for President is expressed, that is to say, in proportion to the population as ascertained by the last census preceding that expression.

The rule proposed in the pending resolution would overturn the established practice of our Government from its foundation.

The first apportionment of Representatives was made by the Constitution itself in Article I, section 2, paragraph 3, above quoted. By the express terms of the article that constitutional apportionment was to last only until the first enumeration should be made. Accordingly,

when the first census had been taken, in 1790, there was a new apportionment, and in the presidential election of 1792 the number of presidential electors in each State, as well as the number of Representatives to be elected from that State, was based upon the population shown by the census of 1790. In every presidential election from that time to this the same rule has been followed. In every case the number of electors was equal to the number of Senators and Representatives to which the State was entitled under the last apportionment and not equal to the number to which the State had been entitled under the preceding apportionment, even though the old Congress elected under that preceding apportionment was still holding over. The rule declared in the act of March 1, 1792, which is now embodied in section 132 of the Revised Statutes, was as follows:

The number of electors shall be equal to the number of Senators and Representatives to which the several States are by law entitled at the time when the President and Vice President to be chosen come into office; except, that where no apportionment of Representatives has been made after any enumeration, at the time of choosing electors, the number of electors shall be according to the then existing apportionment of Senators and Representatives.

The committee has no doubt that this construction of the Constitution, which has now stood as the expression of the understanding of Congress for 114 years, is correct, and recommend that the resolution do not pass.

